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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 362

GODFREY P. SCHMIDT,

Petitioner

vs.

JOSEPH S. McCARTHY and
SEYMOUR J. SPELMAN,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petition of Godfrey P. Schmidt for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit from a judgment entered on the 6th day of May, 1968, affirming a judgment against your petitioner and in favor of the respondents entered in the United States District Court for the District of Columbia on June 22, 1967, and your petitioner's petition for a rehearing *en banc* was denied on the 17th day of June, 1968, respectfully shows:

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not been officially reported and apparently will not be officially reported, but

a copy of the opinion as rendered is appended to this petition. The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated May 6, 1968.

BASIS OF THE COURT'S JURISDICTION

The jurisdiction of this Court is based on Title 28, U.S.C.A., Section 1254(1).

The decision of the United States Court of Appeals for the District of Columbia Circuit is in direct conflict with Title 26 of the Internal Revenue Code covering seizure of property for collection of taxes and specifically Title 26 U.S.C.A., Section 6331(b) and (c).

The judgment of the United States Court of Appeals for the District of Columbia is in conflict with its own decisions in Steve Milone, et als v. John F. English, et al, 113 U.S. App. D.C. 207, 306 F.2d 814, and Schmidt v. McCarthy and Spelman, 125 U.S. App. D.C. 131, 369 F.2d 176.

QUESTIONS PRESENTED

Was the United States Court of Appeals for the District of Columbia Circuit in error in affirming the judgment of the United States District Court for the District fo Columbia, which held that a levy by the Internal Revenue Service on the International Teamsters Headquarters, dated May 11, 1962 and November 8, 1962, a proper levy on a judgment obtained by Schmidt on March 15, 1963?

INTERNAL REVENUE REGULATIONS INVOLVED

Sections (b) and (c) of the Internal Revenue Code, as they appear in Section 6331, are as follows:

> "(b) Seizure and sale of property.—The term 'levy' as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

"(c) Successive seizures.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid."

STATEMENT OF THE CASE

On March 15, 1963, an order was entered in the case of Cunningham, et al v. English, et al, Civil Action No. 2361-57, granting a fee award in the amount of $60,000.00, and the defendant was directed to make payment to Mr. Schmidt.

On March 22, 1963, the respondents filed their complaint for counsel fees as against your petitioner and one John J. Wiley, claiming that they were entitled to $15,000.00 of the $60,000.00 received by petitioner.

The respondents filed an affidavit for an attachment before judgment directed to the International Brotherhood of Teamsters on the same date and on the 2nd day of April, 1963, the International answered the attachment by stating that pursuant to an order entered by Honorable Burnita Shelton Matthews on March 15, 1963 the International Brotherhood of Teamsters is indebted to Mr. Schmidt in the amount of $60,000.00 (J.A. 12).

Your petitioner answered the complaint denying any indebtedness to the respondents and after a trial the United States District Court, on the 13th day of March, 1964, entered judgment in favor of the respondents as against your petitioner in the sum of $15,000.00, and also an order of condemnation of the sum of $15,000.00 in the hands of the International with direction to disburse this sum to the respondents.

An appeal was filed by your petitioner to the United States Court of Appeals for the District of Columbia, being titled Schmidt v. McCarthy, et al, 125 U.S. App. D.C. 131, 369 F.2d 176, in which the United States Court of Appeals for the District of Columbia reversed the action of the trial judge and entered judgment in favor of your petitioner.

A motion was filed in the original cause of action by Schmidt demanding judgment for interest on the $15,000.00 which was held by the International by reason of the attachment issued by the respondents, and the trial Court held, among other things, that your petitioner had failed to establish any damage sustained by him because of the detention of his property since it appears in this proceeding that United States tax liens filed with the International Brotherhood of Teamsters were both prior in time and in right to the attachment before judgment herein, and that petitioner's funds were not detained and he did not sustain any loss because of the detention of his property by respondents.

An appeal was filed to the United States Court of Appeals which affirmed the judgment of the trial Court on the basis that the property at the time it was attached was subject to the superior lien of a levy for unpaid taxes served by the internal Revenue Service upon the garnishee prior to respondents' attachment.

ARGUMENT

The United States Court of Appeals for the District of Columbia Circuit, by its decision, fails to give effect to the sections of the Internal Revenue Code set forth herein.

There was no reference at any time to any levy by the Internal Revenue Service and there was a condemnation of the sum of $15,000.00 which was attached by respondents at the beginning of their action against the petitioner, and

it was not until your petitioner filed his claim for interest for the period the money was withheld under the attachment that the levy was brought into consideration.

The levies which are referred to are contained in the joint appendix filed in the United States Court of Appeals for the District of Columbia Circuit (J.A. 25 and 26) which discloses a levy having been made on May 11, and November 8, 1962, and nothing indicated in the International's answer to the attachment concerning any levy and only that they were withholding $15,000.00 of the $60,000.00 obtained by petitioner under the judgment of March 15, 1963.

It is contended that the International had no property belonging to petitioner nor any obligation to pay any monies to the petitioner at the time these levies were made, and that when and if any other property came into the hands of the International which was due the petitioner that it was the obligation of the Internal Revenue to make additional levies which they had a right to do under Title 26, Section 6331(c).

It is true that your petitioner had a claim against the International prior to March 15, 1963, but the claim of your petitioner was such that the Court could grant or deny to your petitioner the amount which he claimed for his services which were for persons involved in the litigation of Cunningham v. English, Civil Action No: 2361-57.

The United States Court of Appeals, in the case of Milone v. English, supra, at page 212 of the U.S. App. Reports, made the following statement:

> "It lies now within the sound discretion of the District Court, though it is under no legal compulsion to do so, to require the International to pay reasonable counsel fees to appeallants' counsel should the court find, either or both, that they have materially aided in the creation of a fund for the benefit of the International by reason of the eventualities of our remand above authorized, or that they have benefited the International in other ways."

The above statement was again referred to in Schmidt v. McCarthy, supra, in Note 1 on page 132, indicating clearly that no fee was due from the International until such time as the District Court has made a finding that the services have materially aided in the creation of a fund for the benefit of the International * * * or that they have been benefiting the International in other ways and that the District Court was under no legal compulsion to enter a finding requiring the International to pay reasonable counsel fees.

The services of your petitioner were not to the International but for parties involved in litigation against the International.

It is quite definite that your petitioner had no property right in any claim he had against the International until such time as Judge Matthews entered the judgment on March 15, 1963.

In the case of United States v. Mitchell, 349 F.2d 94, the Court said:

> "Levy, unlike lien, does not apply to after acquired property."

The respondents, in their brief on the appeal, relied upon the case of United States of America v. J.T. Hubbell, et al, 323 F.2d 197, wherein one Lewis had completed a contract for painting with the Housing Authority in which he placed one coat of paint on the property to be painted, which was all the contract called for. He completed his work and demanded payment, which was refused because the Housing Authority was under the opinion that there should be at least two coats of paint, and this matter was subsequently litigated and Lewis recovered.

A levy was filed by the United States prior to trial and the Court held that the claim of Lewis against the Housing Authority was not contingent for he had performed his contract and the money was due him at the time.

It is to be noted that in the Hubbell case, supra, the United States was a party and attempting to enforce its rights under a proper levy made by it. In this case the United States is not a party and the only action taken by the United States, in addition to the levies stated above, was exhibit 1 and exhibit 2 on pages 25 and 26 of the joint appendix filed in the United States Court of Appeals in this matter in which they call upon the International to deliver any monies held under the levy of May 11, 1962, and November 8, 1962, with the amounts noted thereon, "or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served."

The answer of the International to the attachment (J.A. 12) clearly stated that they were indebted to Schmidt in the sum of $60,000.00 by virtue of the order of Judge Burnita Shelton Matthews entered March 15, 1963, with no mention of any levy by the United States.

The memorandum of the Court of Appeals in this matter states that the property attached was subject to the superior lien of a levy for unpaid taxes of appellant served by the Internal Revenue Service upon the garnishee prior to appellees' attachment, but the trial Court did enter a judgment of condemnation of these funds, and definitely if there had been a levy the monies would have been transferred long prior thereto to the United States.

In any event, had the monies been immediately turned over to the United States your petitioner would have had credit for the interest thereon for any monies that might have been found due the United States.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

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APPENDIX A

[Filed May 6, 1968]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,177 September Term, 1967

Godfrey P. Schmidt, *Civil 772-63*

Appellant

v.

Joseph S. McCarthy and
Seymour J. Spelman,

Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, Fahy, Senior Circuit Judge, and Wright, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment———of the District Court appealed from in this cause be, and it is hereby, affirmed, for the reason set forth in the attached opinion.

Per Curiam

Dated: May 6, 1968

APPENDIX B

[Filed May 6, 1968]

[Not to be printed or submitted to West for publication.]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21177

Godfrey P. Schmidt, Appellant

v.

Joseph S. McCarthy, and Seymour J. Spelman, Appellees

Appeal from the United States District Court for the District of Columbia

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Decided May 6, 1968

Mr. Cornelius H. Doherty for Appellant.

Mr. Seymour J. Spelman, with whom *Mr. Joseph S. McCarthy* was on the brief, for appellees.

Before BAZELON, *Chief Judge,* and FAHY, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

PER CURIAM: The question is whether, contrary to the decision of the District Court, appellant was entitled to damages, in the form of interest, for the allegedly wrongful suing out by the individual appellees of an attachment before judgment. Without determining whether the attachment was wrongfully sued out, we affirm the judgment of the District Court on the ground that Appellant was not damaged by the attachment as claimed because the property attached was subject to the superior lien of a levy for unpaid taxes of appellant served by the Internal Revenue Service upon

the garnishee prior to appellees' attachment. Deprivation of the use of the fund accordingly was not attributable to the attachment sued out by appellees.

Affirmed.